

if there is one, the infringement will be no different than it is now, harm will accrue to the parties by erring consideration of the issue until when its resolution is necessary to of the case. Moreover, deferral of the a later time will delay final resolution dispute only on the assumption plins will decline to appeal a district olding that the '502 patent is valid. e no basis for making this assumption believe prudence counsels in favor ning to consider a question whose on either will prove unnecessary to a sposition, or, if necessary, will in- be before us again, none the worse delay.

VI.

udgment of the district court will be and the case remanded for further lings in accordance with this opin-

bauld, Senior District Judge, con-

cur with the disposition of this case majority opinion, although I should en willing to affirm simpliciter and the District Court's determination rucial issue of validity vel non of the as well as with respect to the in- issues of jurisdiction, entitlement to e of foreign filing, adequacy of ion and claim, and file-wrapper es-

eve that the District Court in sub- id determine the issue of validity in ace with the criteria of *Graham v. ere*, 383 U.S. 1, 17, 148 USPQ 459, (1966), and that its references to m were merely a rhetorical recital of istic aphorisms," a ceremonial tion in recognition and reflection of ence of language in opinions of this rd the Supreme Court where the of synergism is used. The maxim

ida v. Ag Pro, Inc., 425 U.S. 273, 19 USPQ 449, 452-453 (1976); Ander- k Rock v. Pavement Salvage Co., 396 0-62, 163 USPQ 673, 674-675 (1969); ducts Inc. v. Walter Kidde & Co., 462 1269-70, 174 USPQ 358, 361-362 (C.); Sims v. Mack Truck Corp., 608 F.2d 203 USPQ 961, 963-967 (C. A. 3,

onflicting authorities are listed in note majority opinion. See also Kathleen nton, "Combination Patents and " 37 Washington & Lee L. Rev. 1206

omans 8:28.

utile per inutile non-vitiat might ap- propriately be applied here.

Court where the verbiage of synergism is used. The maxim utile per inutile non vitiat might appropriately be applied here.

Moreover, I should have been content to continue the present ambiguous stance with respect to synergism described in note 17 of the majority opinion, rather than to stand up and be counted in the current synergism controversy.²

Perhaps the word synergism should be discarded (except for its original meaning with respect to the interaction of chemicals or drugs, and for its use as a fashionable fad in television commercials, and for its theological and scriptural overtones).³ But abandoning the verbal trappings and "rhetoric of synergism" must not cause courts to overlook the importance of the requirement of novelty and invention, long required by the patent statutes and the Constitution.

As pointed out in *John Deere* itself, Congress may not "enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby. Moreover, Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available. Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must 'promote the Progress of * * * useful Arts.' This is the standard expressed in the Constitution and it may not be ignored." 383 U.S. at 6, 148 USPQ at 462.

Similarly, this Court has said: "Thus, the courts, in determining obviousness in a combination patent, must undertake the tripartite *Graham* inquiry without losing sight of the necessity to determine whether the device performs its function in an innovative fashion." 608 F.2d at 91, 203 USPQ at 965-966.

It must never be forgotten that the power given to Congress by Art. I, sec. 8, cl. 8 of the Constitution is "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." [Italics supplied] The primary policy of the patent laws is to promote invention for the benefit of the public. The private gain enjoyed by the patentee is secondary; the "exclusive Right"

conferred by the patent monopoly is merely the means of accomplishing the intended result of advancing the growth of science by adding to the sum of human knowledge. A patent cannot be sustained which would withdraw or subtract from what is already known and practiced. *Borden Co. v. Clearfield Cheese Co.*, 244 F.Supp. 366, 368, 146 USPQ 660, 661 (W.D. Pa. 1965). To fence in by a newly created monopoly elements previously available to the public (by aggregating them in a combination patent without any inventive innovation) would be contrary to public policy and fundamental principles of patent law.

To emphasize the importance of these constitutional aspects of our patent system, whether or not they are clothed in "the rhetoric of synergism," it seemed proper to dwell upon them specifically in this concurring opinion when joining in the judgment of the Court.

Court of Customs and Patent Appeals

In re Rasmussen

No. 81-516

Decided June 4, 1981

PATENTS

1. Amendments to patent application — New matter (§13.5)

Claims — Specification must support (§20.85)

35 U.S.C. 132 prohibits introduction of new matter into disclosure of application; 35 U.S.C. 112, first paragraph, requires that claim language be supported in specification.

2. Amendments to patent application — New matter (§13.5)

Claims — Broad or narrow — In general (§20.201)

Specification — Claims as disclosure (§62.3)

Broadening claim does not add new matter to disclosure; disclosure is that which is taught, not that which is claimed; original claim is part of disclosure at time of

EXHIBIT

2

US Serial No.
09/576,944

filing; consideration of original claim as evidencing support in disclosure for later submitted claims does not warrant employment of 35 U.S.C. 132 as basis for rejection of later submitted claims on ground that latter are adding new matter to original claim portion of disclosure; to do so would render Section 132 redundant in light of Section 112, first paragraph; applicant is entitled to claims as broad as prior art and his disclosure will allow.

3. Amendments to patent application — New matter (§13.5)

Claims — Specification must support (§20.85)

Pleading and practice in Patent Office — Rejections (§54.7)

Proper basis for rejection of claim amended to recite elements thought to be without support in original disclosure is 35 U.S.C. 112, first paragraph, not Section 132; latter section prohibits addition of new matter to original disclosure; it is properly employed as basis for objection to amendments to abstract, specifications, or drawings attempting to add new disclosures to that originally presented; past opinions of Court of Customs and Patent Appeals, in cases in which Section 132 claim rejection was reviewed on Section 112 analysis, should not in future be viewed as having approved employment of Section 132 as basis for claim rejection; amended claims involved in those cases should have been rejected under Section 112, first paragraph; claim rejections in those cases could then have been explicitly affirmed or reversed on direct applications of Section 112, rather than on Section 112 analyses applied to Section 132 rejections; similarly, rejections of claims for lack of support when required in reissue applications should be made under Section 112, first paragraph, rather than under new matter prohibition of 35 U.S.C. 251; accordingly, such cases are overruled insofar as they approved rejection of claims under Section 132.

4. Claims — Broad or narrow — In general (§20.21)

Reissue — In general (§58.1)

Fact that claim may be broader than specific embodiment disclosed in specification is in itself of no moment; statutory provision for broadened claims in reissue applications is intended to meet precisely situation in which patentee has claimed less than he had right to claim.

5. Pleading and practice in Patent Office — In general (§54.1)

Specification — Sufficiency of disclosure (§62.7)

35 U.S.C. 112 requires disclosure of only one mode of practicing invention; insistence upon boilerplate recitation in specification that specific embodiment shown was not meant to limit breadth of claims, or that example given was only one of several methods that could be employed, is exaltation of form over substance.

Appeal from Patent and Trademark Office Board of Appeals.

Application for reissue of patent of Max Otto Henri Rasmussen, Serial No. 884,775, filed Mar. 8, 1978, for reissue of Patent No. 3,963,549, issued June 15, 1976. From decision affirming rejection of claim 6, applicant appeals. Reversed; Nies, J., dissenting.

George Vande Sande, Washington, D.C., for appellant.

Joseph F. Nakamura (Robert D. Edmonds, of counsel) for Patent and Trademark Office.

Before Markey, Chief Judge, and Rich, Baldwin, Miller, and Nies, Associate Judges.

Markey, Chief Judge.

The decision of the Patent and Trademark Office Board of Appeals (board) affirming the rejection of claim 6 under 35 USC 132 is reversed.

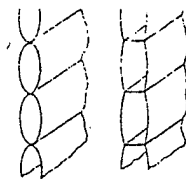
Background

Appealed claim 6 is contained in reissue application S.N. 884,775 filed March 8, 1978.¹ Original claim 6 in the reissue application was directed to a method of manufacturing a thermal insulating member.² Rasmussen described in his specification the steps of applying adhesive to one side of a tubular plastic film, winding the film around two spaced drums, and, when the desired number of layers have been wound, cutting the film layers

¹ That application seeks reissue of U.S. Patent 3,963,549, issued June 15, 1976.

² 6. A method of manufacturing a thermal insulating member from a thin film of plastic material and comprising a pair of spaced opposing generally parallel sidewalls which are bridged by a plurality of spaced transverse walls comprising the steps of:

transversely to the direction of winding. When the film units are extended, a plastic laminar form shown below results.



Viewing the particular winding of the layers of tubular film, Rasmussen later amended claim 6, by substituting "adhesive" for language specifying use of

winding a continuous length of the plastic material in its flattened state. The generally cylindrical member thus formed has a circumference corresponding to the circumference of the insulating member, the adhesive member, applying to the flattened width of predetermined width substantially to the width of said walls and thus to the desired width of the sidewalls, said application occurring prior to the contact of the tube during the winding step of the tube already wound on the member so that successive tubular member on said cylinder adhere to each other along the width of adhesive application terminating the winding of the cylindrical member when the number of layers of the plastic material wound thereon corresponding to the length of the thermal insulating member and cutting the superimposed successively adhering layers of plastic material in a direction transverse to the direction of the tube, said assemblage when straightened and then extended transverse to the longitudinal direction of the tube so as to expand the successive tubes forming said thermal insulating member. [Emphasis added.]

³ Amended claim 6 reads as follows:

6. A method of manufacturing a thermal insulating member from a thin film of plastic material and comprising a pair of spaced opposing generally parallel sidewalls which are bridged by a plurality of spaced transverse walls comprising the steps of:

winding a continuous length of the material in its flattened state. The generally cylindrical member thus formed has a circumference corresponding to the circumference of the insulating member, each successive layer of material being wound

nd practice in Patent Office terial (§54.1)

n — Sufficiency of dis- §62.7)

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Patent and Trademark Of-
ppeals.

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78, for reissue of Patent No.
1 June 15, 1976. From deci-
section of claim 6, applicant
ad; Nies, J., dissenting.

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aura (Robert D. Edmonds,
Patent and Trademark Of-

Chief Judge, and Rich,
ler, and Nies, Associate

Judge.

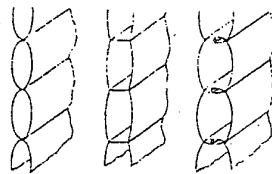
n of the Patent and
Board of Appeals (board)
ction of claim 6 under 35
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background

6 is contained in reissue
884,775 filed March 8,
claim 6 in the reissue
directed to a method of
a thermal insulating
issen described in his
eps of applying adhesive
ular plastic film, winding
wo spaced drums, and,
number of layers have
tting the film layers

seeks reissue of U.S. Patent
e 15, 1976.
manufacturing a thermal in-
om a thin film of plastic
rising a pair of spaced op-
parallel sidewalls which are
y of spaced transverse walls
s of:

transversely to the direction of winding.
When the film units are unfolded and ex-
tended, a plastic laminate in one of the
forms shown below results:



Viewing the particular method of adher-
ing the layers of tubular film as immaterial,
Rasmussen later amended claim 6, inter-
alia, by substituting "adheringly applying"
for language specifying use of adhesives.³

winding a continuous length of a tube formed of
the plastic material in its flattened state into a
generally cylindrical member whose cir-
cumference corresponds to the desired width of
the insulating member,

applying to the flattened tube a band of ad-
hesive of predetermined width corresponding sub-
stantially to the width of said spaced transverse
walls and thus to the desired spacing between
the sidewalls, said application of adhesive oc-
curring prior to the contacting of the flattened
tube during the winding step to the portion of
the tube already wound onto the cylindrical
member so that successive layers of said
tubular member on said cylindrical member
adhere to each other along the predetermined
width of adhesive application,

terminating the winding of the plastic tube onto
the cylindrical member when a predetermined
number of layers of the plastic tube has been
wound thereon corresponding to the desired
length of the thermal insulating member,
and cutting the superimposed assemblage of
successively adhering layers of the plastic tube
in a direction transverse to the longitudinal
direction of the tube,

said assemblage when longitudinally
straightened and then extended in a direction
transverse to the longitudinal direction of the
tube so as to expand the successively joined
tubes forming said thermal insulating member.
[Emphasis added.]

³ Amended claim 6 reads as follows:

6. A method of manufacturing a thermal in-
sulating member from a thin film of material
and comprising a pair of spaced opposing
generally parallel sidewalls which are bridged
by a plurality of spaced transverse walls com-
prising the steps of:

winding a continuous length of a tube formed of
the material in its flattened state onto a
generally cylindrical member whose cir-
cumference corresponds to the desired width of
the insulating member, each successive layer of

The examiner rejected the amended
claim, saying "adheringly applying" was
"new matter", prohibited by §132, explain-
ing that limitation of the scope of the
original disclosure to use of adhesives meant
that allowance of the broader claim would
be an enlargement of the scope of the dis-
closure.

The board affirmed, saying Rasmussen's
application disclosed only one embodiment
(applying adhesive to join the sheets) and
that broadening the scope of the claim add-
ed new matter to the application.

Issue

The issue presented is whether amended
claim 6 was properly rejected under 35 USC
132.

Opinion

[1] Confusion is generated when related
but distinct statutory provisions are treated
as interchangeable. Section 132 prohibits
the introduction of new matter into the dis-
closure of an application. Section 112, first
paragraph, requires that claim language be
supported in the specification. This court,
having said that a rejection of an amended
claim under §132 is equivalent to a rejection
under §112, first paragraph, for lack of sup-
port, appears to have contributed to the
treatment of those separate statutory sec-
tions as interchangeable. See *In re Hogan*,
559 F.2d 595, 608, 194 USPQ 527, 539 (CC-

said tube being wound to overlie the im-
mediately preceding layer to provide thereby a
generally cylindrical band of tubular layers ex-
tending axially along said cylindrical member a
distance corresponding substantially to the
flattened width of said tube,

adheringly applying the flattened tube during
the winding step to the portion of the tube already
wound onto the cylindrical member over a band
of predetermined width corresponding substan-
tially to the desired width of said spaced transverse
walls and thus to the desired spacing between
said sidewalls,

terminating the winding of the tube onto the
cylindrical member when a predetermined
number of layers of the tube has been wound
thereon corresponding to the desired length of
the thermal insulating member,

and cutting the superimposed assemblage of
successively adhering layers of the tube in a
direction transverse to the longitudinal direc-
tion of the tube,

said assemblage when longitudinally
straightened and then extended in a direction
transverse to the longitudinal direction of the
tube so as to expand the successively joined
tubes forming said thermal insulating member.
[Emphasis added.]

PA 1977), *In re Wertheim*, 541 F.2d 257, 265, 191 USPQ 90, 99 (CCPA 1976), *In re Bowen*, 492 F.2d 859, 864, 181 USPQ 48, 52 (CCPA 1974), *In re Smyth*, 480 F.2d 1376, 1385, 178 USPQ 279, 286 (CCPA 1973).⁴

Apparently reluctant to reverse on the sole ground that an improper statutory provision had been employed, and recognizing the burden on the parties inherent in a return of the case for application of §112, this court has reviewed §132 claim rejections on the basis of whether the rejected claim found support in the original disclosure. See *In re Eickmeyer*, 602 F.2d 974, 981, 202 USPQ 655, 662 (CCPA 1979); *In re Barker*, 559 F.2d 588, 593-94, 194 USPQ 470, 474 (CCPA 1977); *In re Winkhous*, 527 F.2d 637, 640, 188 USPQ 129, 131 (CCPA 1975).

Similarly, new matter rejections of claims under §251 have been reviewed on the basis of a §112 analysis, that is, on whether a claim found support in an original patent. See *In re East*, 495 F.2d 1361, 1366, 181 USPQ 716, 719 (CCPA 1974).

As is illustrated in the present case, employment of §§132 and 112 as interchangeable leads to confusion of two distinct concepts: (1) the adding of new matter to the disclosure; and (2) the broadening of a claim.

[2] Broadening a claim does not add new matter to the disclosure. Disclosure is that which is taught, not that which is claimed.⁵ An applicant is entitled to claims as broad as the prior art and his disclosure will allow.

[3] The proper basis for rejection of a claim amended to recite elements thought to be without support in the original disclosure, therefore, is §112, first paragraph, not §132. The latter section prohibits addition of new matter to the original disclosure. It is properly employed as a basis for objec-

tion to amendments to the abstract, specifications, or drawings attempting to add new disclosure to that originally presented. Past opinions of this court, in cases in which a §132 claim rejection was reviewed on a §112 analysis, should not in future be viewed as having approved the employment of §132 as a basis for claim rejection. The amended claims involved in those cases should have been rejected under §112, first paragraph. The claim rejections in those cases could then have been explicitly affirmed or reversed on direct applications of §112, rather than on §112 analyses applied to §132 rejections.⁶ Accordingly, such cases are overruled insofar as they approved rejection of claims under §132.

Turning to the merits of this appeal, we will again treat a §132 claim rejection before us as though it had been made under §112, first paragraph. We proceed to decide the case on that basis in the interest of judicial economy. Were we to merely reverse the rejection as having been made under an inappropriate statutory provision, and say no more, the PTO would presumably enter a rejection under §112 and that decision would then be appealable to this court.

Amended claim 6 recites the adhering step as "adheringly applying" one layer of tube to an adjacent earlier layer. Rasmussen's specification describes that step as follows: "[A]dhesive is applied to the tubular foil 4 in a narrow or broader strip, possibly in two narrow strips. Accordingly, the face of the tubular foil successively sticks to the winding lying on the drums." The language of the specification thus describes one method of "adheringly applying" one layer to the other.

[4] As above indicated, that a claim may be broader than the specific embodiment disclosed in a specification is in itself of no moment. Indeed, the statutory provision for broadened claims in reissue applications is intended to meet precisely the situation in which a patentee has claimed "less" than he had a right to claim. 35 USC 251.

In *In re Smyth*, 480 F.2d 1376, 1384, 178 USPQ 279, 285 (CCPA 1973), this court stated:

A hypothetical situation may make our point clear. If the original specification of

⁴ Similarly, rejections of claims for lack of support when required in reissue applications should be made under §112, first paragraph, rather than under the new matter prohibition of 35 USC 251.

a patent application on the scale justice: disclosed only a 1-pound weight" as a counterbalance to determine the weight of a pound of flesh, we believe the applicant should be prevented by the so-called "description requirement" of the first paragraph or the prohibition against new matter §132, from later claiming the counterbalance as a "metal weight" or similar 1-pound "weight" although "metal weight" and "weight" would be progressively broader than "weight," including even such a disclosed, but obviously art-reco equivalent, "weight" as a poultry feathers. The broader claim language would be permitted because the *description of the use and function* of the lead weight scale counterbalance in the *whole disclosure* would immediately convey to any skilled in the scale art the knowledge the applicant invented a scale with pound counterbalance weight, regardless of its composition.

[5] Similarly, one skilled in the art reading Rasmussen's specification would understand that it is unimportant how layers are adhered, so long as they adhered. Thus the phrase "adhering" is supported by the evidence found in the specification.

Conclusion

The phrase "adheringly applying" supported in the specification, rejection that claim under 35 USC 132 paragraph, is reversed. Rejection under appropriate statutory provision, §112, would have been inappropriate.

Reversed

⁵ The board seemed to realize that 35 USC 132 requires disclosure of only one mode of practicing the invention, but nevertheless insisted boilerplate recitation in the specification of a specific embodiment shown was not to limit the breadth of the claims, or that the disclosure given was only one of several methods that could be employed. Such insistence is heretofore an alteration of form over substance.

⁴ MPEP 706.03(o), 608.04-608.04(c), and 1411.02 relate to considerations set forth herein.

⁵ We deal here with rejection of amended claims, and, by implication, with rejection of entire new claims submitted after filing. An original claim is part of the disclosure at the time of filing. *In re Anderson*, 471 F.2d 1237, 1238, 176 USPQ 331, 332 (CCPA 1973). Consideration of an original claim as evidencing support in the disclosure for later submitted claims does not warrant employment of §132 as a basis for rejection of later submitted claims on the ground that the latter are adding new matter to the original claim portion of the disclosure. To so hold would render §132 redundant in light of §112, first paragraph.

to amendments to the abstract,ifications, or drawings attempting to new disclosure to that originally ented. Past opinions of this court, in which a §132 claim rejection was wed on a §112 analysis, should not in e be viewed as having approved the oyment of §132 as a basis for claim re-on. The amended claims involved in e cases should have been rejected under , first paragraph. The claim rejections ose cases could then have been explicit-ffirmed or reversed on direct ications of §112, rather than on §112 /ses applied to §132 rejections.* Accor-y, such cases are overruled insofar as approved rejection of claims under

urning to the merits of this appeal, we again treat a §132 claim rejection before though it had been made under §112, paragraph. We proceed to decide the on that basis in the interest of judicial omy. Were we to merely reverse the re-on as having been made under an inap-riate statutory provision, and say no , the PTO would presumably enter a ion under §112 and that decision d then be appealable to this court.

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a patent application on the scales of justice disclosed only a 1-pound "lead weight" as a counterbalance to determine the weight of a pound of flesh, we do not believe the applicant should be prevented, by the so-called "description requirement" of the first paragraph of §112, or the prohibition against new matter of §132, from later claiming the counterbalance as a "metal weight" or simply as a 1-pound "weight" although both "metal weight" and "weight" would indeed be progressively broader than "lead weight," including even such an undisclosed, but obviously art-recognized equivalent, "weight" as a pound of feathers. The broader claim language would be permitted because the *description of the use and function* of the lead weight as a scale counterbalance in the *whole disclosure* would immediately convey to any person skilled in the scale art the knowledge that the applicant invented a scale with a 1-pound counterbalance weight, regardless of its composition.

[5] Similarly, one skilled in the art who read Rasmussen's specification would understand that it is unimportant *how* the layers are adhered, so long as they are adhered.⁷ Thus the phrase "adheringly applying" is supported by the example found in the specification.

Conclusion

The phrase "adheringly applying" being supported in the specification, rejection of that claim under 35 USC 132, first paragraph, is *reversed*. Rejection under the appropriate statutory provision, 35 USC 112, would have been inappropriate.

Reversed

⁷ The board seemed to realize that 35 USC 112 requires disclosure of only one mode of practicing the invention, but nevertheless insisted upon a boilerplate recitation in the specification that the specific embodiment shown was not meant to limit the breadth of the claims, or that the example given was only one of several methods which could be employed. Such insistence is here an exaltation of form over substance.

District Court, S.D. New York

Hedaya Brothers, Inc.
v. Capital Plastics, Inc.

No. 79 Civ. 4104
Decided July 23, 1980

COPYRIGHTS

1. Infringement — Tests of (§24.209)

Test for determining whether copyright infringement has occurred is whether average lay observer would find substantial similarity in designs, recognizing copy as appropriation of copyrighted work; plaintiff in copyright infringement action can only prevail if overall aesthetic impressions created by designs are substantially same.

2. Infringement — In general (§24.201)

Matter copyrightable — In general (§24.301)

In making determination of copyright infringement, it must be remembered that plaintiff's copyright does not protect idea of design, but only plaintiff's particular expression of that idea; even if defendant has sedulously borrowed each of plaintiff's ideas, that alone is not violative of copyright statute.

3. Infringement — In general (§24.201)

That ideas contained in design were old hat and originality of design was minimal must also be weighed in considering claim of infringement because, where basic design is not original with plaintiff small variations by subsequent designers may protect them from charges of infringement.

4. Infringement — Tests of (§24.209)

Accused has not infringed plaintiff's copyrights where aesthetic appeals of parties' respective designs are not substantially same, and would not strike average lay observer as being substantially same.

5. In general (§24.01)

Notice of copyright (§24.35)

Copyright infringement action is governed by Copyright Act of 1909 where designs in question were created and published prior to January 1, 1978, effective date of Copyright Act of 1976; under old Act, statutory protection was obtained only by publication of work with notice of copyright required by what was formerly 17 U.S.C. 10, in form required by former 17 U.S.C. 19; while under saving provision of former 17